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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ALBERTO MEDRANO, Defendant and Appellant.	A105387 (Marin County Super. Ct. Nos. SC124563A & SC130752A)

Following negotiated pleas of guilty to charges of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); undesignated section references are to that code) in two cases (Nos. SC124563A and SC130752A), and a probation violation in one of those cases, Carlos Alberto Medrano was sentenced to a doubled upper term of eight years for one assault (with a strike prior § 1170.12, subd. (c)(1)) and a consecutive one year for the other assault (§ 1170.1, subd. (a) [subordinate term, one-third the midterm]). Medrano appeals claiming that aggravating factors not admitted by him or found true by a jury violated his rights under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) and require a remand for resentencing. We affirm without need for a remand.

BACKGROUND

Case No. SC124563A. An information filed August 1, 2002, charged Medrano in six counts for a violent incident with his estranged wife, designated Jane Doe: assault with a knife and hammer, a serious-felony strike (count 1; §§ 245, subd. (a)(1), 1192.7, subd. (c)(31), 1170.12, subds. (a)-(c)); terrorist threats (count 2; § 422), dissuading a witness by force or threat (count 3; § 136.1, subd. (c)(1)); corporal injury on a spouse (count 4; § 273.5, subd. (a)); false imprisonment by violence (count 5; § 236); and

contempt for disobeying a domestic violence order (count 6; § 166, subd. (c)(1)). On the same day as the filing, Medrano entered a negotiated plea of guilty to count 1 in return for dismissal of all other counts (and a probation revocation petition based on the same incident) "with *Harvey* waivers" (*People v. Harvey* (1979) 25 Cal.3d 754) allowing the court to "consider the facts and circumstances of the dismissed counts and the dismissed petition to revoke in determining what is a just and appropriate sentence . . . ."[1] He was

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[1] The probation report recites facts gleaned from an officer dispatched to Doe's address on a Saturday night after a neighbor called the police. Doe said Medrano was under a restraining order except for visits with their son and daughter (ages 7 and 10), who lived with Doe. Doe came home from shopping and found Medrano already in the house, without permission. Doe was in her bedroom for about 45 minutes before Medrano entered saying he still loved her and wanted to talk about their relationship. When Doe rose from her bed and said she would only speak about the children, Medrano forced her back onto the bed, straddled her, with his legs pinning her arms, and tried to choke her with his hands. When she pushed him away, he said "he might cut off a cheek or a piece of her nose," adding, "[H]e was going to be her shadow and she was never going to get rid of him." Doe got out from under him, but he would not let her leave the room.

Doe yelled for her children to help as she struggled with Medrano. The children began crying. Doe freed herself, managed to get her portable phone, and told Medrano to leave or she was going to call the police. She then heard "two blades being sharpened against each other" and saw Medrano walk from the kitchen holding a nine-inch kitchen knife in one hand and a hammer in the other. He pointed the knife at her and said, " 'I'm going to kill you right now.' " Then he left, saying that if she called the police, "I'm going to kill you" and that if he got arrested and deported, he was "going to kill all of Doe's family and drain her father's blood." Doe called a neighbor, crying and sobbing loudly, telling what happened, and saying she feared being killed if she called the police. The neighbor called the police for her, and a responding officer saw redness below Doe's neck and scratches to her right arm and stomach.

In a written statement (translated from Spanish), Medrano said he had a hammer and other tools (knife not mentioned) but went outside with them to fix his car, where he later found police looking for him because the neighbor had called. He admitted to the probation officer, after his guilty plea, having a restraining order against him but claimed to have lived with Doe for months. He said he argued with her but left the apartment to avoid the argument and worked on his car. When Doe called him back inside, he had tools with him but "flatly denied all of the allegations," saying he "may have leaned against" Doe but never threatened or injured her. The children, he said, were watching television, not crying. "[T]he only thing he did wrong," he insisted, "was to re-enter the

advised of a potential prison sentence of two, three or four years, or up to a year of jail term if granted probation, plus a parole period in addition to "that term of imprisonment," should he be denied or violate probation. The plea of guilty came right after the court phrased it as "assault with means of force likely to produce great bodily injury, and with a deadly weapon and instrument, an assault upon Jane Doe using a knife and a hammer."

On September 18, 2002, Judge Verna Adams called Medrano's "a marginal case for probation," given its seriousness and two misdemeanor domestic violence priors, but suspended imposition of sentence and granted probation on conditions that included obeying the law, serving 10 months in jail (less nearly six months credit), abiding by the restraining order and, before leaving jail, completing a course called Programa Respecto.

First probation violation charges (SC124563A). A January 2003 petition to revoke that probation charged that Medrano, just five days after the probation grant (and while enjoying a reprieve from starting his jail term), threatened to kill Doe (§ 422) and violated two restraining orders (§ 166, subd. (c)(1)).

Case No. SC130752A. On July 22, 2003, a five-count complaint was filed against Medrano for crimes committed days earlier, again against Doe at her home and this time in the presence of the children. He had wounded her with a file sharpened into a knife.[2]

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apartment when his wife called him." He pled guilty, he said, because he "could not see any other option" and "just wanted to put the incident behind him and get it over with."

[2] A summary in the presentence report states: "On 7/18/03 officers responded to [Doe's] residence after receiving a 911 call regarding a domestic violence incident . . . . [Doe] told officers that [Medrano] had attempted to kill her with a knife. . . . [She] was sobbing uncontrollably. [Her] daughter was also crying hysterically in the adjacent room. [Doe] told officers that she had left her front door unlocked, and [he] entered the residence uninvited. She asked [Medrano] to leave, and he responded by stating he just wanted to say hello to the children. The victim agreed to a short visit, and she walked into the children's bedroom to distance herself from [Medrano]. [He] then followed her into the bedroom and said he wanted to talk to her. [Doe] again asked him to leave. [Medrano] suddenly slapped [her] on the face several times with an open hand, then called her a whore and accused her of having sex with other men. He then grabbed [her] by the neck, pushed her onto the bed and straddled her while she was yelling for help. [Medrano] reached into his rear pocket and drew a large sharp metal object with a wood handle and said, 'I'm going to kill you, daughter of a whore.' [Doe] lifted her hand to

The charges were: attempted murder (count 1; §§ 187, subd. (a), 664); assault with a deadly or dangerous weapon—"knife, file" (count 2; § 245, subd. (a)(1)); criminal threats (count 3; § 422); false imprisonment by violence (count 4; § 236); and corporal injury on a spouse (count 5; § 273.5, subd. (a)). A further count charged that, on the day after those crimes, Medrano delayed or obstructed a police officer (count 6; § 148, subd. (a)(1)). The felony counts (1 through 5) also carried enhancing and other special allegations, as appropriate, of: violent, serious, and strike felonies (§§ 1170.12, subds. (a)-(c), 1192.7, subd. (c)); the prior strike from SC124563A (§ 1170.12, subds. (a)-(d)); commission while on release from custody in SC124563A (§ 12022.1, subd. (b)); personal use of a deadly weapon (§ 12022, subd. (b)(1)); and a prior serious felony in SC124563A (§ 667, subd. (a)(1)).

Second probation violation charges (SC124563A). On the same day as the new complaint, the People filed another petition to revoke probation in SC124563A, based on the new felony offenses—specifically, that Medrano attempted to stab Doe, assaulted her "with a file knife," threatened to kill her, and violated her personal liberty by use of force

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protect herself and yelled for her daughter to call the police. A struggle ensued and [Medrano] dropped the metal object. [Doe] then grabbed the object by the blade, and [Medrano] ordered her to release it. He forcibly pulled the file from her grip and cut [her] hand. [He] fled from the residence and an all points bulletin went out for his arrest.

"As officers were leaving the residence, [Doe] retrieved a new message left on her phone by [Medrano]. It stated, 'You already called the police, know you'll have to suffer for the consequences.' The following day [Medrano] was located at the Peacock Gap Golf Course, where he was working as a maintenance worker. When officers arrived the manager identified [Medrano] as an individual known by the name of Ricardo. Officers located [Medrano] in the maintenance area. When [he] saw officers, he began to run, however, officers ordered him to stop."

In a written statement quoted in the report, Medrano later admitted wanting to "scare my wife through intimidation" but claimed no intent to "do damage" to her. He said they were living together, not separated, and he came home to find her talking on the phone with another man. When she ignored him and started to walk out of the room, he related: " 'I grabbed her by the hand and pushed her onto the bed. I told her what she was doing was not okay. I never hit her.' "

and with a deadly weapon, the "file knife." This had violated probation conditions that he lead a law abiding life and abide by the protective order issued in that case.

Current negotiated plea. All matters were resolved on October 1, 2003, by a negotiated settlement, again before Judge Adams. In new case SC130752A, Medrano pled guilty to the count 2 aggravated assault and admitted the prior strike, exposing himself to probation ineligibility and a doubling of his term, and waived the right to seek *Romero* relief (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497). In return, he obtained dismissals of all other counts and the earlier probation violation petition. As before, the dismissals were with a *Harvey* waiver that meant that, "as to those cases and counts, . . . the court, at sentencing, could consider the facts and circumstances of those dismissed counts in determining what is a just and appropriate sentence . . . ." Medrano accepted, as "a fair statement of" his plea's factual basis, this summary by the prosecutor: "On July 18th, 2003, the defendant entered the home of his estranged wife and his two children, uninvited. An argument ensued with his wife, at which point he locked the door of the bedroom, locking her inside, straddled her, holding her down on the bed, and removed an object from his back pocket, which was a file which had been filed down to have a sharp blade on one side resembling a knife. [¶] He then told [her] that he was going to kill her, and attempted to stab her several times in the neck. The victim was able to keep him at bay and fight him off. He eventually dropped the knife and ran from the residence. [¶] The victim did suffer an injury, a small cut to a finger on her hand."

The matter was referred to probation for a sentencing recommendation and the effect of the *Harvey* waivers. Medrano was advised during the proceedings of a doubled prison term of four, six or eight years on the new offense plus no aggregate term limits for consecutive sentencing.

Also, while the parties fail to mention it, the transcripts show dismissal of another "case" with a *Harvey* waiver—No. SC128026A. This was apparently a "complaint" filed concerning the January 2003 probation revocation petition charging a "threat[] to kill" Doe, in violation of section 422, and violations of two protective orders (case Nos. SC109313 & SC124563) in violation of section 166, subdivision (c)(1). The complaint

itself is not in our record but is referred to in the January petition as a "New case filed # SC128026A." This had to be the Medrano assault on Doe of September 23, 2002, five days after the initial probation grant. The prosecutor moved at sentencing "to withdraw the D.A. petitions to revoke in 109313A, *and dismiss SC128026A with a Harvey waiver*, as well as to dismiss the remaining counts in SC130752A with *Harvey* waivers." (Italics added.) The prosecutor also spoke of "the case that was dismissed with a *Harvey* waiver, that occurred—the offense date on that case was five days subsequent to his being placed on probation in the trailing matter. He was released pending remand and he was given 30 days to remand, and within five days of being placed on probation, he committed another offense which was not—he was not convicted of but that was *Harvey* waived, and the Court can consider that obviously in rendering this decision."

Current sentencing. Sentencing in the two cases (SC124563A & SC130752A) was on December 3 and 4, 2003. A presentence report considered by the court outlined Medrano's criminal and social history. Identifying four aggravating factors and none in mitigation, it recommended an upper term of four years for the new assault (doubled by the strike) plus a consecutive one year for the prior assault, for a total of nine years. Identified aggravating factors were: (1) the crime involved a threat of great bodily harm or other acts disclosing a high degree of cruelty (Cal. Rules of Court, rule 4.421(a)(1); all undesignated rule references are to that source), particularly, the victim having been "in fear for her life"; (2) Medrano's prior adult convictions were numerous or of increasing seriousness (rule 4.421(b)(2)), i.e., his "history portray[ing] a pattern of violence"; (3) he was on probation when the crime was committed (rule 4.421(b)(4)); and (4) his prior performance on probation was unsatisfactory (rule 4.421(b)(5)).

In argument, the prosecutor reminded the court of the *Harvey*-waived assault just days after the initial grant of probation, urged adopting the report factors in aggravation, and suggested three more: Medrano was armed with a weapon (rule 4.421(a)(2)); he took advantage of a position of trust or confidence (gaining access to Doe "under the auspices of coming to visit the children") (rule 4.421(a)(11)); he had engaged in violent conduct, now and before, which indicated a serious danger to society (rule 4.421(b)(1)). The

defense urged three mitigating factors: that alcohol tended to trigger Medrano's acts of violence and thus was a condition significantly reducing culpability (rule 4.423(b)(2)); his guilty plea was an early acknowledgement of wrongdoing (rule 4.423(b)(3)); his recent success in "C-Pod" suggested that, if not ineligible for probation, it might have been granted (rule 4.423(b)(4)); and Doe had written asking for leniency so that the children could see their father (see rule 4.408).

The court ruled in part: "This is a very serious offense, it was violent, it was scary, your children were around. It's very lucky that your wife wasn't more seriously injured than she was. I do pay a lot of attention to the wishes of victims, whatever their wishes are. It's not the last word on a sentencing decision but it's certainly an important one. [¶] . . . [¶] As to Count Two, I believe the circumstances do warrant the aggravated term, and in making that determination, I am placing reliance on the fact that you put your victim in fear for her life, you've shown a pattern of violence in the past, your performance on probation has been unsatisfactory, and I believe that if not in prison, you would be a danger to others in our society." The court had used a marker to highlight all four of the factors called out in the report—including that Medrano was "on probation"—but, orally at the hearing, did not separately mention Medrano being on probation at the time of his latest offense.

Judge Adams then denominated that strike-doubled "Count Two" term from SC130752A as the "principal term" (eight years) and added 12 months for the "Count One" offense in SC124563A as mandated, we observe, by the principal-subordinate-term scheme of section 1170.1, subdivision (a). Curiously, however, she did the math in an unusual way. She articulated the subordinate term not as 12 months derived from "one-third of the middle term" (§ 1170.1, subd. (a)) of three years for an aggravated assault (§ 245, subd. (a)(1)), but as a four-year upper term with 36 months "stayed" pursuant to section 1170.1. This is curious because the code section does not ask the court to choose an upper, middle or lower term, but simply to use one-third of the middle term. In selecting an upper term, Judge Adams cited "the circumstances . . . I just stated, primarily the violence involved in that offense."

When the case came on again the next day to settle the credits, defense counsel asked Judge Adams to reconsider her choice of an upper term for the new assault (not mentioning the old) and choose the middle term, arguing that Medrano had "really turned the corner" since being in custody. Judge Adams said she was aware of, and encouraged, Medrano's recent progress but that it was, in her view, "simply too little, too late. I think this—to sentence him to anything other than the aggravated term would require an act of intellectual dishonesty that I'm not prepared to engage in." She denied "reconsideration."

She similarly ruled again on January 6, 2004, when Doe personally appeared to request a reduced sentence, after sending a statement that, while she was separated from Medrano, her children missed him and should see him. Judge Adams responded: "[A]t the time I sentenced Mr. Medrano, this was his second very serious, very scary domestic violence offense, and he didn't seem to have learned anything by his grant of probation in the first case, and I'm very aware of, and was at the time of sentencing, of the victim's stated wishes and concerns in the matter and I'm very sympathetic to them. [¶] My first responsibility is for community safety, and in view of Mr. Medrano's apparent inability to control himself, and his violent behavior, I felt that the sentence I imposed was appropriate, and I still do. [¶] The request for me to recall the sentence is denied."

DISCUSSION

Relying on *Blakely*, *supra*, 542 U.S. ___ [124 S.Ct. 2531], Medrano claims that reliance on aggravating factors violated a federal constitutional right to have a jury decide those questions beyond a reasonable doubt and that the error is "structural," requiring reversal without a showing of prejudice. The People claim waiver by failure to raise the issue below (pre-*Blakely*), that *Blakely* does not apply to the choice of upper terms under California's triad sentencing scheme, that if it does, the court below properly relied on "recidivism factors" exempt under *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*), and that any error is non-structural and harmless.

Blakely held that a state court denied a defendant his constitutional right to a jury trial by increasing his sentence from a "standard range" of 49 to 53 months, to 90 months, based on a sentencing finding that he acted with deliberate cruelty. (*Blakely*, *supra*, 124

S.Ct. at p. 2537.) This violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), that, " 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' (*Blakely*, *supra*, 124 S.Ct. at p. 2536.) *Blakely* clarified that the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 2537.) Those principles were recently confirmed by the high court in invalidating federal sentencing guidelines insofar as they demanded upward departures from standard guideline ranges upon judge-made findings. (*United States v. Booker* (Jan. 12, 2005) 5__ U.S. ___ [05 C.D.O.S. 315, 317, 319.)

In this case, where sentencing predated the unexpected holding of *Blakely*, we reject the People's claim of waiver, for an objection would have been futile (see generally *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648). We also conclude that *Blakely* does apply to our sentencing scheme when a court relies on non-recidivist aggravating factors, not admitted or found true by a jury, to select an upper term. The upper term in a triad is certainly within the range authorized by statute, but *Blakely* defines the statutory maximum as what may be imposed without any additional findings (*Blakely*, *supra*, 124 S.Ct. at p. 2537). Under California law, the maximum a judge may impose without any additional findings is the middle term. (§ 1170, subd. (b); rule 4.420.)

On the other hand, we reject Medrano's notion that *Blakely* error is structural and immune from prejudice analysis. Rather, we employ a two-step analysis, disregarding any *Blakely* factor that we cannot say beyond a reasonable doubt that a jury would have found true (*Chapman v. California* (1967) 386 U.S. 18, 24), and then, asking whether it is reasonably probable that the court would have chosen a lesser sentence had it known that those factors were improper (*People v. Price* (1991) 1 Cal.4th 324, 492).

The court below relied on two factors—Medrano's "unsatisfactory" performance on probation and "pattern of violence"—that to a large extent involve *Apprendi*-exempt recidivism. The need for a jury to find facts that increase a sentence beyond the statutory maximum does not apply to the fact of a prior conviction (*Almendarez-Torres*, *supra*, 523

U.S. 224; *Apprendi*, *supra*, 530 U.S. at pp. 490; *Blakely*, *supra*, 124 S.Ct. at p. 2536), and this exception applies broadly not just to the fact of the prior, but to other issues related to the recidivism (*People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223). Related but *extrinsic* circumstances, on the other hand, could implicate *Apprendi* in a given case.

The probation history is straightforward here, for prior grants and uniform failures were undisputed, shown in the report and partially admitted by Medrano in his latest plea bargain. Medrano was granted 36 months probation in March 1998 for a misdemeanor battery (§ 242) due to domestic violence against Doe. He was evidently still on probation when he attacked her again in June 1998, grabbing her from behind, throwing her to the ground, and then punching her in the stomach. He was granted three years of supervised probation upon his plea of guilty in December 1998 to misdemeanor spousal battery (§ 243, subd. (e)(1)) and in May 2002, again while on probation, perpetrated felony corporal injury on Doe (§ 273.5; case No. SC124563A). This brought a third grant of probation, in September 2002, five days after which he attacked her again. Then came the June 2003 attack (SC130752A). The jury-trial exception to *Apprendi* is not limited to "the precise 'fact' of a prior conviction. Rather, . . . no jury trial right exists on matters involving the more broadly framed issue of 'recidivism.' " (*People v. Thomas*, *supra*, 91 Cal.App.4th at p. 221.) A record of prior probation grants and failures, like a record of prior convictions, thus falls within the exception. Arguably, whether one's prior performance on probation was "unsatisfactory" could pose a jury question, but any error in that regard on this record was harmless beyond a reasonable doubt. Every probation had ended with a repeat of the domestic violence for which it was granted. Medrano managed to comply with probation enough to finish a batterer's course, but to no avail, and he failed to comply at all with his latest grant of probation. He violated within five days and then again 10 months later, attacking the same victim each time. He had failed to appear for a remand into custody, quit his job of five years and worked under a false name in order to elude the police and, by implication, probation supervision (fn. 2, *ante*). No jury could reasonably find that his performance was satisfactory.

The court did not separately articulate the aggravating factor that Medrano was on probation at the time of his latest offense, although this was cited in the report and never disputed. We assume that the court took it into consideration in finding that Medrano's performance on probation was unsatisfactory. Such reliance did not violate *Blakely* or *Apprendi*, for it was, first, an exempt recidivist factor, and second, necessarily admitted by Medrano in admitting his probation violation in SC124563A.

The court's "pattern of violence in the past" finding referred either to numerous or increasingly serious priors, which the report paraphrased as "a pattern of violence" (see rule 4.421(b)(2)), or to the People's oral argument that Medrano engaged in a pattern of violence indicating a serious danger to society (rule 4.421(b)(1)). If the latter, then the "pattern of violence" finding goes with the finding that Medrano "would be a danger to others in our society." Either way, Medrano's prior convictions were *Apprendi*-exempt, and the only constitutional question is whether the court usurped a jury function by (1) characterizing the record as showing a pattern of violence or danger to others in society or (2) as Medrano suggests, perhaps using violence that had not resulted in convictions.

Taking the second possibility first, any error was harmless beyond a reasonable doubt. It is true, for example, that Medrano's September 23, 2002 attack on Doe, five days after being granted probation in SC124563A, never resulted in a conviction, but the resulting case (SC128026A) was dismissed with a *Harvey* waiver and left a record which, while scant on detail, was never challenged. The charges were of a threat to kill (§ 422) and violations of protective orders (§ 166, subd. (c)(1)) which we know to have included the orders issued days before with the September 2002 grant of probation. On this record, no juror could reasonably conclude that the "threat to kill" was not violent. By not challenging this despite knowing it would be used through the *Harvey* waiver, the defense conceded as much. The 1997 and 1999 offenses were established by convictions as batteries, which are intrinsically violent. Medrano's pleas of guilty to the 2002 and 2003 aggravated assaults (§ 245)—one with a knife and hammer and the other with a sharpened file—showed violence as a matter of law, and this factual basis for the latter offense was particularly graphic: "On July 18th, 2003, the defendant entered the home of

his estranged wife and his two children, uninvited. An argument ensued with his wife, at which point he locked the door of the bedroom, locking her inside, straddled her, holding her down on the bed, and removed an object from his back pocket, which was a file which had been filed down to have a sharp blade on one side resembling a knife. [¶] He then told [her] that he was going to kill her, and attempted to stab her several times in the neck. The victim was able to keep him at bay and fight him off. He eventually dropped the knife and ran from the residence." Doe also suffered a cut to a finger on one hand.

As for the court characterizing Medrano's history as "a pattern of violence" or showing a danger to others in society, we likewise conclude that any error was harmless beyond a reasonable doubt. Medrano does not begin to explain how a jury could have found his five violent attacks over five years—highly similar and against the same victim—to be other than a "pattern." Nor does he explain how this did not show a danger to others in society. Doe, at least, was one "other" in our society who had been attacked repeatedly and with growing frequency over a five-year period.

Last is the finding that, in the June 2003 attack, Medrano put Doe "in fear for her life." That finding was not itself related to recidivism but, in the context of the factual basis admitted by Medrano for his plea, was the only reasonable conclusion to be drawn. He had locked the bedroom door, straddled Doe, held her down, said he was going to kill her, and tried to stab her several times in the neck with a sharpened file as she fought him off, suffering a cut finger. Since no finding other than "fear for her life" was reasonable, any *Apprendi* error was harmless beyond a reasonable doubt.

Medrano claims that reliance on the victim's fear was an impermissible dual use of facts in that Doe's fear was "arguably" an element of his assault with a deadly weapon (§ 245, subd. (a)(1)). That point is forfeited, for he was apprised of the factor below but never raised the issue. (*People v. Steele* (2000) 83 Cal.App.4th 212, 225-226.) He also exceeds the scope of any constitutional claim under *Blakely* and, in any event, misreads the dual-use prohibition. That rule prohibits imposing an upper term based on "[a] fact that is an element of the crime" (rule 4.421(d)) but not using conduct *beyond* that needed to establish an aggravated assault (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 887;

People v. Whitehouse (1980) 112 Cal.App.3d 479, 484-485) or other crime (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562; *People v. Garcia* (1989) 209 Cal.App.3d 790, 793-794). The act and intent elements of aggravated assault focus on the perpetrator (*People v. Calantuono* (1994) 7 Cal.4th 206, 213-221), not the " 'subjective belief' " of the victim (*People v. Griggs* (1989) 216 Cal.App.3d 734, 742). "The victim's fear, lack of fear, injury, or lack of injury are not elements which need to be proved or disproved. All that is necessary is that there is a victim; the characteristics of the victim are not critical elements of the offense." (*Ibid.*)

Any *Blakely* error was harmless. Moreover, were we to find prejudice in any of the *Blakely*-implicated factors and proceed to ask whether it is reasonably probable that the court would have chosen a lesser sentence had it known that any such findings were improper (*People v. Price*, *supra*, 1 Cal.4th at p. 492), we would not need to remand for resentencing. The court had valid factors and ample *Harvey*-waived conduct to justify the upper term and remarked, in declining to reconsider, "[T]o sentence him to anything other than the aggravated term would require an act of intellectual dishonesty that I'm not prepared to engage in." Medrano points to the "mitigating" factors his counsel urged below, but he does not argue that the court's implicit findings against those factors were an abuse of discretion or that their rejection implicated *Blakely* or *Apprendi*.

Finally, while Medrano would evidently have us repeat the above analyses for all aggravating aspects of the "Count One" assault in SC124563A that led the court to find an aggravated term of four years "warrant[ed]" on that count as well, we find the exercise moot. As already explained earlier in this opinion (p. 7, *ante*), selection of an upper, middle or lower term for that offense was unnecessary. The court designated that as the "subordinate" term and was therefore mandated by law to impose one-third the middle term of three years—or one year (§§ 1170.1, subd. (a), 245, subd. (a)(1)). That is exactly what the court did in the end, and there would be no point in remanding to resentence on that count even if we found prejudicial *Blakely*/*Apprendi* error in choosing an upper term.

DISPOSITION

The judgment is affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.